



Cathy Walker

BOARD OF INQUIRY (*Human Rights Code*)

IN THE MATTER OF the Ontario *Human Rights Code*, R.S.O. 1990, c.H.19, as amended;

AND IN THE MATTER OF the complaint by Keltie Jones dated November 3, 1992, alleging breach of settlement by Highmark Properties.

B E T W E E N :

Ontario Human Rights Commission

- and -

Keltie Jones

Complainant

- and -

Highmark Properties

Respondent

DECISION (Costs)

Adjudicator : Heather MacNaughton

Date : April 17, 1996

Board File No: BI-0038-95

Decision No : 96-011-C

Board of Inquiry (*Human Rights Code*)
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APPEARANCES

Ontario Human Rights Commission	)	
	)	Naomi Overend, Counsel
	)	

Keltie Jones	)	
	)	Neil McCormick, Counsel
	)	

Highmark Properties	)	
	)	Ron McCloskey, Counsel
	)	

On November 16th, 1995, I rendered a decision dismissing this breach of settlement complaint because a prerequisite to the complaint had not been satisfied: the Ontario Human Rights Commissioners had never approved the settlement.

I invited submissions with respect to costs, and received written submissions from the Ontario Human Rights Commission ("Commission") and the Respondent Highmark Properties ("Highmark"). Highmark seeks solicitor and client costs in the amount of \$34,200.12. The Commission opposes any cost order and alternatively, submits that the amount claimed by Highmark is excessive.

JURISDICTION TO AWARD COSTS

My jurisdiction to award costs arises under section 41(4) of the *Ontario Human Rights Code* ("Code"). Upon dismissing a complaint I may award costs where I find that:

- a) the complaint was trivial, frivolous, vexatious or made in bad faith, or
- b) in the particular circumstances, undue hardship was caused to the respondent.

SUBMISSIONS

Highmark submits that by any of the criteria set out in section 41(4), this is an appropriate case for costs. It relies on earlier jurisprudence of the Board for definitions of the words trivial, frivolous and vexatious in the section. Those decisions, *Pham v. Beach Industries Ltd.* (1987), 8 C.H.R.R. D/4008 and *Ouimette v. Lily Cups Ltd.* (1990), 12 C.H.R.R. D/19, adopt definitions developed in civil proceedings in which pleadings are challenged.

Highmark further urges me to find, based on the processing, investigation and settlement of the original complaint, that the Commission acted in bad faith and should be penalized with a cost order. It further submits that this complaint for breach of settlement of the original complaint should have been withdrawn from the Board by the Commission upon discovery of the absence of an essential component. Failure to do so, it submits, caused the respondent undue hardship.

The Commission submits that it advised the other parties as soon as it became aware of the procedural difficulty in the breach of settlement complaint. Thereafter, in counsel's submission, its conduct was appropriate in assisting the Respondent in bringing the motion for dismissal. The Commission further submits that its conduct with respect to the processing and settling of the original complaint was not before me, nor was it canvassed in evidence. Therefore, in counsel's submission, the only basis on which I could award costs, is the Commission's error in referring the breach of

settlement complaint to the Board in the first place, given that there was no legal foundation for so doing.

DISCUSSION

There are three issues for me to decide:

- a) was the complaint trivial, frivolous, vexatious or made in bad faith, or in the particular circumstances was undue hardship caused to the Respondent;
- b) if so, am I prepared to exercise my discretion to award costs in this case, and
- c) if so, in what amount.

The circumstances surrounding the original complaint and its settlement are not, in my view, relevant to the question before me. That matter was not before me and I heard no evidence with respect to it. I am therefore only prepared to consider the conduct of the Commission in referring the breach of settlement complaint to the Board in determining whether this is an appropriate case for costs.

I do not accept Highmark's contention that the Commission should have withdrawn the present complaint when it was discovered that the Commissioners had not approved settlement of the prior complaint. Arguably, the Commission cannot withdraw a complaint subsequent to its referral to the Board. The Commission is one of three parties before the Board. Although the Commission has carriage of the complaint, the Complainant is a separate party and can proceed

without the Commission. As occurred in this case, it is always open to the Complainant to take a position opposite to that of the Commission. In some cases the Commission has settled a complaint on terms which it believes satisfies its public interest mandate, yet the Complainant has elected to proceed before the Board in the absence of the Commission.

In my view the power to award costs under section 41(4) should be exercised sparingly. In pursuing its mandate to further the public interest in protecting human rights in Ontario, the Commission should not be unduly hampered by the threat of a cost order against them. Unlike civil litigation, costs in a human rights matter do not simply “follow the event”. The Board of Inquiry has no jurisdiction to award costs against a respondent, even where its conduct may have unduly protracted the hearing.

Section 41(4) imposes an obligation on the Commission to act responsibly and to objectively assess the merits of a case as it proceeds through the investigation stage. More particularly under section 34(1)(b), the Commission has discretion to “not deal” with a complaint if it appears to the Commission that the subject matter of the complaint is trivial, frivolous, vexatious or made in bad faith. If a complaint is not dismissed under section 34, a second evaluation is required under section 36 prior to the referral to the Board. The Commission has an obligation to assess the complaint to determine if referral to a hearing is appropriate, and if the evidence is sufficient to warrant an inquiry.

If such a review had been properly done at either the section 34 or the section 36 stage in this case, the absence of the Commissioner's approval of the settlement would have become readily apparent. It certainly became readily apparent to the solicitor given responsibility for carriage of the matter before me. I can only conclude that no such thorough review occurred prior to the assignment to counsel. Surely it is incumbent on the Commission to ensure that all necessary legal prerequisites exist before making a referral, particularly given changing Commission policies on settlement protocols, evidence of which was adduced before me.

Based on the errors in handling this file, more particularly set out in my earlier decision, and on my findings as to the responsibility of the Commission, I am prepared to find that this complaint was frivolous. Applying the test in *Ouimette v. Lily Cups*, there was an absence of an essential fact-- the Commissioner's approval of the settlement-- with the result that the complaint was materially deficient in law from the outset.

In the result, I am prepared to award costs to Highmark on the basis that the complaint was frivolous. Having found that the complaint was frivolous, I need not deal with the arguments on bad faith and undue hardship. The criteria listed in section 41(4)(a) are disjunctive and a finding with respect to one of them is sufficient to ground an award of costs.

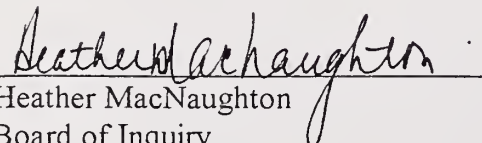
QUANTUM

I have reviewed the Bill of Costs filed by Highmark. I am not prepared to award costs on a solicitor and client basis. To do so in this case would be unnecessarily punitive to the Commission. Further, much of the hearing time for which the Respondent seeks costs would have been avoided had the Complainant not taken a position contrary to that of the Commission. The hearing dates of September 6th and 7th, 1995 were in fact scheduled at the request of the Complainant to enable it to controvert the position being taken by the Commission. Had this not occurred, the hearing would have been completed in one day.

Further, the presence of two counsel on behalf of Highmark on all three days of this motion was unnecessary in light of the position being taken by the Commission which essentially supported that of the Respondent.

The Commission made no submission as to an appropriate award of costs. Applying the considerations outlined above to the bill of costs as filed, I fix and award Highmark costs in the amount of \$5000.00.

DATED at Toronto, this 17th day of April, 1996.


Heather MacNaughton
Board of Inquiry